



# **THE ATTORNEY GENERAL OF TEXAS**

**AUSTIN 11, TEXAS**

**WILL WILSON  
ATTORNEY GENERAL**

March 27, 1958

Honorable George W. Morris  
County Attorney  
Montgomery County  
Conroe, Texas

Opinion No. WW-405

Re: Authority of a county to re-locate or rebuild fences, cattle guards, and culverts as a part of the consideration for the purchase of right of way for a County Road or a Farm to Market Road.

Dear Sir:

Your request for an opinion states the following questions:

"Can Montgomery County, Texas, acquire right of way by purchase, contract or otherwise (except by condemnation proceedings) and legally obligate itself to remove and re-establish and/or rebuild the fences, cattle guards and culverts where the work is the whole or a part of the consideration for such new right of way or additional right of way secured by the county either for itself or for and on behalf of the State of Texas for Farm to Market Highways?"

Your letter indicates that the performance of this work by county employees, rather than by an independent contractor engaged by the property owner, will result in savings both to the landowner and the county. Further, you state that such a procedure would eliminate delay in clearing the new right of way for future construction.

In Attorney General's Opinion No. 0-1457, it was stated:

"While right-of-way is acquired by purchase, contract or other wise except by condemnation proceedings, and the construction or rebuilding of the fence is the whole or a part of the consideration for such new right-of-way or additional right-of-way secured by the county, then the county would be obligated to carry out its agreement with the landowner regarding the rebuilding or construction of the fence according

to the contract or agreement had between the parties."

We think the above statement to be sound, and adopt it as our opinion in this case. Accordingly, the county may contract with a landowner, as a part of the consideration for the purchase or right-of-way, to replace the fence of the owner along the right-of-way taken for road or highway purposes.

We do not think that the use of county labor and equipment to satisfy this obligation constitutes the use of county equipment for private purposes as condemned by Article 9780, Vernon's Penal Code, and Rowan v. Pickett, 237 S.W. 2d 734 (Tex. Civ. App.), for the reason that this use of county employees and equipment is in the furtherance of a lawful governmental function of the county, i.e. the building and maintenance of a system of roads.

We would further point out that the funds used as consideration for the purchase of such right-of-way may not be taken from the Permanent Improvement Fund of the County. Attorney General's Opinion V-831 (1949). The Road and Bridge Fund of the County should be used for this purpose.

The consideration for the work and labor done and materials furnished by the county as a part of the purchase price and consideration to be paid for the acquisition of the land in question should be specifically set forth in the contract.

#### SUMMARY

A county may legally contract as a part of the purchase price of right-of-way to relocate or rebuild the fences along said right-of-way caused by the widening or changing of the road or highway. Said services should be paid for out of the Road and Bridge Fund of the County.

JHM:mg:pg:wc

Yours very truly,

APPROVED:  
OPINION COMMITTEE  
Geo. P. Blackburn, Chairman  
J.C. Davis, Jr.  
C.K. Richards  
John Reeves

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Attorney General of Texas  
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REVIEWED FOR THE ATTORNEY GENERAL BY: W. V. Geppert.